harm consumers – gravely undermines their petition. As the following sub-sections explain, eliminating the core unbundling provisions of the 1996 Act at *this point in time* would *not* increase consumer welfare. Instead, it would simply reproduce ACS's pre-1996 monopoly control over last-mile access – the very feature that the 1996 Act was meant to eliminate. And because of the RCA's intervening retail price deregulation, discussed above, ACS could exploit its re-acquired monopoly position in ways never before possible.

1. The 1996 Act Was Designed To Eliminate ILECs' Control Over Bottleneck Facilities and To Deny Them the Ability To Raise Rivals' Costs.

The 1996 Act constitutes a "pro-competitive, de-regulatory national policy framework" meant to displace traditional retail rate regulation.[173] "Indeed the Supreme Court has emphasized that Congress's passage of the Act represented 'an explicit disavowal of the familiar public-utility model of rate regulation … in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.'"[174]

In implementing these principles, Congress recognized that "it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant."[175] To prevent the existing network owners from excluding competition, Congress intended that "[s]ome facilities

[173] S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.).

[174] *TRRO* ¶ 51 (quoting *Verizon Comms. v. FCC*, 535 U.S. 467, 489 (2002) ("*Verizon*")).

[175] S. Rep No. 104-230, at 148; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15510 (¶¶ 14-15) (1996) ("*Local Competition Order*").

and capabilities . . . will likely need to be obtained from the incumbent local exchange carrier as network elements *pursuant to new Section 251.*"[176] *In addition to requiring* incumbents to provide UNEs at cost-based rates, Congress also established the Section 271 checklist for former Bell Companies.[177] As interpreted by the Commission and affirmed by the D.C. Circuit, these requirements place an additional obligation on BOCs to unbundle, *inter alia*, loops, transport, and switching at just, reasonable, and non-discriminatory prices.[178] Moreover, as the Commission recently conceded in the *Omaha Forbearance Order*, "impairment determinations . . . sometimes are under-inclusive,"

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[176] S. Rep No. 104-230, at 148; *See generally Omaha Forbearance Order* ¶ 76 ("One of Congress's primary goals in the 1996 Act was the creation of competitive local exchange and exchange access markets. To foster such competition, Congress gave new market entrants, which in 1996 lacked sufficient economies of scale and scope to compete effectively in the local exchange and exchange access markets, the right to compete with the incumbent LEC in these markets by leasing at cost-based rates key components (*i.e.*, UNEs) of the incumbent LEC's own telecommunications network. Under this approach, a high degree of regulatory intervention may initially be required in order to generate competition among direct competitors in a situation where one carrier owns the telecommunications network that will be used to provide service to a single pool of customers."); *see also Verizon* at 503 n.20 ("a policy promoting lower lease prices for expensive facilities unlikely to be duplicated reduces barriers to entry (particularly for smaller competitors) and puts competitors that can afford these wholesale prices (but not the higher prices the incumbent LECs would like to charge) in a position to build their own versions of less expensive facilities that are sensibly duplicable.") (cited by *TRRO* ¶ 51); *Local Competition Order* ¶ 679 ("Congress recognized in the 1996 Act that access to the incumbent LECs' bottleneck facilities is critical to making meaningful competition possible. As a result of the availability to competitors of the incumbent LEC's unbundled elements at their economic cost, consumers will be able to reap the benefits of the incumbent LECs' economies of scale and scope, as well as the benefits of competition.").

[177] *See* 47 U.S.C. § 271(c)(2)(B).

[178] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications* Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (¶¶ 649-67) (2003) ("*TRO*"), affirmed in relevant part by *United States Telecom Association v. FCC*, 359 F.3d 554, 588-90 (DC Cir. 2004) ("*USTA II*").

meaning that competitors cannot always obtain at TELRIC prices all of the network elements necessary to compete effectively.[179]

Congress paid special attention to the price at which incumbents would offer UNEs – after all, even before 1996, potential entrants had access to last-mile special access products at "just and reasonable" tariff rates.[180] But Congress recognized that those products and their "just and reasonable" rates had not induced the proper level of competitive entry, so it provided for § 251(c)(3) unbundling. The Commission recently affirmed in the *TRRO* that this obligation was "intended as an *alternative* to [special access] services, available at alternative [cost-based] pricing."[181] Moreover, the Commission has also reaffirmed that because of the under-inclusiveness of the Commission's impairment determination, the requirement of unbundling at "just, reasonable, and non-discriminatory" rates is also critically important to ensuring competitive entry.[182] As discussed in greater detail below, however, in Anchorage, Section 251(c)(3) is the only means of ensuring the availability of these elements because the incumbent is not a former Bell company and therefore is not subject to the Section 271 checklist requirements.

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[179] *Omaha Forbearance Order* ¶ 104 ("When the Commission established its impairment determinations, it did so at a level designed to provide incentives for self-provisioning competitive facilities, rather than based on a finding that in all cases self-provisioning of competitive facilities is economically feasible. As a result, the Commission's impairment determinations necessarily sometimes are under-inclusive. In other words, it sometimes is not feasible for a reasonably efficient competitive carrier economically to construct all of the facilities necessary to provide a telecommunications service to a particular customer despite not being impaired under the Commission's rules without access to such facilities.")

[180] *TRRO* ¶ 51.

[181] *Id.* (emphasis in original).

[182] *Omaha Forbearance Order* ¶¶ 103-110.

In the language of the economic and antitrust literature, Section 251 unbundling at cost-based pricing is necessary to solve the well-recognized vertical effects problems caused by monopoly control of bottleneck facilities – the facilities, "such as the local loop . . ., that are most difficult for entrants to replicate promptly."[183] As Dr. Sappington explains in his attached declaration, because of what is known as the "one monopoly rent" theorem, an entity with monopoly control over a bottleneck facility that is used as an input in a distribution chain typically "can recover all [the] monopoly profit available in that chain."[184] In other words, an unregulated monopoly at the wholesale level will result in retail prices and terms equivalent to those that would prevail in a monopoly at the retail level.

The explanation for this "'widely accepted' (albeit 'counterintuitive')" [185] principle is that a firm with control over a necessary input to a retail product has essentially unlimited ability to "raise its rivals' costs" and thereby determine the prevailing retail price.[186] It is in the monopolist's self-interest to charge its retail rivals just enough for the wholesale input so that the rivals must charge a monopoly retail price.

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[183] *Local Competition Order* ¶ 696; *see also USTA II*, 359 F.3d at 561 ("The most obvious candidates for . . . obligatory [unbundling under § 251(c) are] the copper wire loops historically used to carry telephone service over the 'last-mile' into users' homes"). The Supreme Court has noted the close conceptual relationship between the provisions of the 1996 Act addressing bottleneck facilities and the concept of "essential facilities" in antitrust doctrine. *See AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 388 (1999).

[184] Sappington Decl. ¶ 17; *see also Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 23 & Appendix A (1st Cir. 1990) (Breyer, C.J.) ("'[T]here is but one maximum monopoly profit to be gained from the sale of an end-product.'") (quoting P. Areeda & D. Turner, 3 Antitrust Law ¶ 725b at 199 and citing R. Bork, *The Antitrust Paradox* 229 (1978) ("Vertically related monopolies can take only one monopoly profit"); R. Posner & F. Easterbrook, *Antitrust* 870 (2d ed. 1989) ("There is only one monopoly profit to be made in a chain of production.")).

[185] *Town of Concord*, 915 F.2d at 23.

[186] Sappington Decl. ¶¶ 11-23, 87-96, 101-102.

Alternatively, the monopolist may charge even more for the input, so that rivals must exit the market (because they cannot match the prevailing monopoly price), thereby leaving the entire retail market to the incumbent monopolist. In either event, the monopolist will extract the full monopoly rent for each unit sold. And, even more important, the prevailing retail price will be the monopoly price, meaning that consumer welfare will be far lower than in a competitive market.

The Commission has long recognized that the "raising rivals' costs" and "one monopoly rent" principles are essential to understanding the local exchange market and, in particular, the market for local loops.[187] It has noted, for example, that "[a] carrier may be able to unilaterally raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, which its rivals need to offer their services."[188] Similarly, it has observed that "[a] carrier can raise prices profitably and sustain them above competitive levels, and thereby exercise market power, ... by increasing its rivals' costs or restricting its rivals'

[187] *Local Competition Order* ¶ 368 ("[T]he local loop is the most formidable entry barrier to the local exchange market and has the strongest bottleneck characteristics of any network element."); *see also SBC-AT&T Order* ¶ 55; *Verizon-MCI Order* ¶ 55. The Commission has also frequently discussed the closely-related issue of incumbents using their monopoly control over existing networks to impose a "price squeeze" on competitors. "A price squeeze exists when (1) a firm operates as a seller of both retail and wholesale offerings, (2) one or more companies relies on the firm's wholesale offerings to compete with the firm on the retail level, and (3) the difference between the retail prices for the service at issue and the firm's price for the wholesale input – if any – is too narrow to allow its retail competitors to cover their costs by providing service in the retail market." *TRRO* ¶ 59 n.159. The only difference between the classic price squeeze discussed in the *TRRO* and the situation here is that there is no limit (for the most part) on retail prices, meaning that a monopolist can force its retail rivals to raise their prices to the monopoly level, rather than force them out of the market entirely.

[188] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, 18 FCC Rcd 10914 (¶ 5 n.10) (2003).

output through the control of an input that is necessary for the provision of service."[189] The following section explains why these explanatory principles demonstrate that forbearance will empower ACS to increase its revenues at the expense of Anchorage customers.

2. Granting Forbearance Will Give ACS Nearly Unlimited Ability to Raise GCI's Costs.

The forbearance ACS seeks would allow it either (1) to refuse outright to lease UNE loops to GCI, or (2) to offer GCI UNE loops at whatever price ACS chooses. Under either option, the result will be monopoly prices in the Anchorage local services market and reduced consumer welfare.

Outright Refusal To Offer Unbundled Loops. It seems likely that if ACS receives the forbearance it seeks, it will choose simply to refuse to lease UNE loops of any sort to GCI. After all, if ACS intended to continue to offer loops, but not at TELRIC prices, it would have sought forbearance from only Section 252(d)(1) and not from Section 251(c)(3) as well. Moreover, because ACS is not an RBOC, it is not covered by

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[189] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, 12 FCC Rcd 23891 (¶ 144) (1997) ("*FCC Foreign Participation*"). The Commission also has noted that "[f]irms with market power in an 'upstream' input market can engage in discrimination in a 'downstream' end-user market by favoring one downstream entity at the expense of its competitors. When the upstream firm possesses market power, the downstream competitors have few, if any, alternative sources for the upstream input. We find that the relevant input markets … generally include … local access facilities …". *Id.*, 12 FCC Rcd at 23952 (¶ 146). The Commission identifies "price discrimination, non-price discrimination, and price squeeze behavior" as "three anticompetitive strategies" a vertically-integrated ILEC with market power could employ to "cause harm to competition … ." *Id.*, 12 FCC Rcd at 23952 (¶ 146). Thus, an ILEC with dominant control over key inputs can employ many anticompetitive policies (not just the one illustrated here) to raise its rivals' costs and thereby harm retail customers.

Section 271's independent obligation to provide unbundled loops, transport, and switches at just, reasonable, and non-discriminatory rates.

For the reasons given above, if GCI cannot lease UNE loops it may have to withdraw in the near term from providing facilities-based service to roughly 70% of its current lines.[190] Besides the immediate loss of revenue, the harm to GCI's brand perception will be immense. As noted above, GCI has worked assiduously to convince Alaskan customers that it can provide the same or better quality service as the incumbent ACS[191] – even to the point of offering free trips to customers in appreciation for their willingness to remain on GCI waiting lists. Moving a large number of customers to resale, or being unable to serve them entirely, would cause serious harm to GCI's accumulated goodwill.

The loss of revenue caused by the end of unbundled loops will also severely compromise GCI's ability to continue with its plan to build cable-based last-mile facilities.[192] As noted above, GCI currently believes that retrofitting its own existing last-mile facilities for residential customers is in its commercial best interest.[193] But this

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[190] *Cf. Omaha Forbearance Order* ¶ 104 ("In addition, even when it is economically feasible for a reasonably efficient competitor to construct such facilities, 'the construction of local loops generally takes between six to nine months absent unforeseen delay.' In order to provide service to customers, competitive LECs therefore may require wholesale access to [the ILEC's] network on a temporary basis while they construct their own facilities to their customers' premises. If carriers lacked wholesale access to [the ILEC's] network elements in such cases, they sometimes would not be able to provide service to that customer. The record contains no evidence to indicate that such an outcome would be a rare occurrence.") Here of course, for reasons specific to Alaska, the time to construct loops may be much longer than six to nine months. *See generally* Section III.B above.

[191] *See* Section II.A above.

[192] Borland Decl. ¶¶ 27-49; *see also* Zarakas Decl. ¶¶ 12-13, 32-33.

[193] *See* Section III above; *see also* Zarakas Decl. ¶¶ 9-10, 32-33.

calculation reflects specific expectations about consumer goodwill (which feeds into the expected revenue payoff for constructing facilities) and also about future revenue.[194] Being forced to stop serving a large number of current customers would obviously change the calculations on both counts. And needless to say, discouraging facilities-based competition would be immensely perverse in light of the goals of the 1996 Act and the Commission's longstanding interest in designing its unbundling rules to provide competitors with the incentive to build facilities where economically feasible.[195] As for customers, the Commission's recent *Omaha Forbearance Order* makes quite clear that the loss of unbundled loops would constitute a serious blow to consumer welfare. The Commission specifically refused to remove the legal obligation to offer unbundled loops in *any* Omaha wire center. As the Commission explained, "[g]ranting … forbearance from the application of Section 251(c)(3) on the basis of competition that exists only due to Section 251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification."[196]

Instead, the Commission specifically affirmed that Qwest must continue to offer unbundled loops, switches, and transport under Section 271 at just, reasonable, and non-discriminatory prices.[197] If unbundling was necessary in the Omaha market, where cable facilities-based competition is far more mature than in Anchorage, it is surely necessary here. Equally important, if GCI were to radically curtail its service to existing customers,

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[194] *See* Borland Decl. ¶ 27-49.

[195] *TRRO* ¶ 35.

[196] *Omaha Forbearance Order* ¶ 68 n.185.

[197] *Id.* ¶ 100-110.

Anchorage customers would also cease to benefit from the many technical and service improvements described above that GCI has brought to the local marketplace.[198]

ACS suggests that the continued availability of resale under Section 251(c)(4) will allow GCI to continue to compete even if it cannot obtain unbundled loops.[199] This claim is entirely foreclosed by the *Omaha Forbearance Order*, in which the Commission declined to forbear from unbundling at regulated prices regardless of the availability of resale.[200] The claim is also plainly disproved by the history of competition in Anchorage. As discussed above, when ACS raised its retail prices in 2001, the resale-based competitor (AT&T Alascom) was forced to raise its rates as well.[201] Only GCI's UNE-based price discipline was able to return prices to competitive levels. The clear implication of this example – as well as basic economic logic – is that ACS will move quickly after receiving forbearance to raise its retail prices to the monopoly level that maximizes ACS's net revenue. Indeed, because the RCA is poised to deregulate retail prices for most services, ACS will have no problem raising its rates to the monopoly level. The net losers will be consumers.

Equally important, forcing GCI to move to a resale-based model would turn back the clock on competition in Anchorage in other ways as well.[202] To begin with, it would mean that GCI would no longer serve customers using its own switch. Instead, GCI would use ACS's switch and thus be forced to rely on ACS for basic customer service

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[198] *See* Section II.A above.

[199] ACS Petition at 35-36.

[200] *Omaha Forbearance Order* ¶¶ 57-83, 100-110.

[201] Tindall Decl. ¶ 13; Borland Decl. ¶ 47; Sappington Decl. ¶¶ 88-90.

[202] Borland Decl. ¶¶ 40-49; Declaration of Lisa Wurts ¶¶ 8-14 ("Wurts Decl."), attached hereto as Exhibit K.

functions, such as E911, 411, number porting, directory records, and so forth.[203] Not only would the transition of such functions from GCI's system to ACS's system consume significant resources without corresponding social benefit,[204] but it would also give ACS substantial control over the quality of service that GCI's retail customers receive. ACS will have both the means and the motive to prefer its own retail customers – in essence reproducing the raising rivals' costs problem, except through quality of service rather than through price.

In addition, forcing GCI to rely on resale would seriously compromise GCI's ability to move forward with its plans to build its own cable-based last-mile facilities for single unit residential customers. To begin with, resale will provide GCI with less revenue per customer than UNE-based service.[205] This overall reduction in revenue will limit an important source of capital that GCI presently uses to finance the construction of its own facilities.[206] Equally important, at the operational level, it will divert capital and administrative resources away from the complex (and pro-competitive) task of transferring UNE-based customers to GCI's cable facilities, and towards complex (but socially wasteful) task of moving UNE-based customers to resale facilities.[207] Taken together, the reduced revenue and radically increased administrative expense will also prevent GCI from spending the money necessary to provide enhanced service (*e.g.*,

[203] Borland Decl. ¶ 42.

[204] *Id.* ¶ 41.

[205] *Id.* ¶ 46.

[206] *Id.* ¶ 34.

[207] *Id.* ¶¶ 40-48.

longer hours at retail stores and so forth).[208] This will, in turn, erode consumer goodwill and thus further compromise GCI's business case for building its own facilities. Finally, by raising GCI's operating costs, the move to resale-based service will limit GCI's ability to engage in discounting through bundling. The ultimate losers in each instance will be Anchorage customers.

Refusal To Offer Loops At TELRIC Prices. Even if ACS chooses to offer UNE loops, under the forbearance that ACS seeks, it will be under no legal obligation to offer them at TELRIC or even "just, reasonable, and nondiscriminatory" prices.[209] This would plainly undermine all of the progress that the 1996 Act has made to date in Anchorage, and in fact return consumers to a worse position than ever before.

To begin with, giving ACS unfettered ability to raise GCI's cost of serving roughly 70% of its current lines will lead to monopoly prices for not only those customers, but also ACS's current customers who benefit from the price discipline that GCI has brought to Anchorage. ACS disputes this point, suggesting that it will have an incentive to negotiate reasonable wholesale rates for UNEs even in the absence of any legal obligation to do so.[210] But as the D.C. Circuit has recognized, in the absence of a legal duty to offer unbundled loops pursuant to some pricing standard, incumbents have

[208] *See generally* Tindall Decl. ¶¶ 4-18.

[209] ACS asserts in its petition that its local exchange and exchange access offerings would be subject to Sections 201 and 202 of the Communications Act even if the Commission grants forbearance here. ACS Petition at 36. But ACS does not identify any Commission precedent that mandates this result, nor does it explain how its interpretation is consistent with Section 2(b) of the Communications Act. 47 U.S.C. § 152(b); *see generally La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

[210] ACS Petition at 34-35.

only an "incentive to set the tariff price as high as possible."[211] In rejecting the incumbents' claim that they would voluntarily provide competitors with the level of access to their networks required by the 1996 Act, the Commission used even stronger language:

> It would be a hideous irony if the incumbent LECs, simply by offering a service, the pricing of which falls largely within their control, could utterly avoid the structure instituted by Congress to, in the words of the Supreme Court, "give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[212]

The Commission's *Omaha Forbearance Order* reaffirms and synthesizes the aforementioned principles. It requires unbundling with Section 271 pricing for some wire centers and unbundling with Section 252 (d)(1) pricing for others precisely because the incentives of a free market would *not* be sufficient to provide competitors with the level of access to the ILEC's network demanded by the 1996 Act.[213]

To the extent that there are remaining price caps (as for basic local telephone service to residential and single-line business users through 2010), ACS can use its control over the price of unbundled loops to subject GCI to a "price squeeze." As the *TRRO* explains, "[a]n incumbent [with control over loops] would have substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a

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[211] *USTA II,* 359 F.3d at 576.

[212] *Verizon*, 535 U.S. at 489.

[213] Nor will ACS have an incentive to offer these bottleneck facilities at cost-based rates in order to gain at least a fair portion of wholesale (if not retail) revenue from the line, as was the case in the *Omaha Forbearance Order. Omaha Forbearance Order* ¶ 81. Here, because there is not full facilities-based competition, ACS can simply charge supra-competitive wholesale prices, and thereby obtain the full monopoly rent at the wholesale level. There is literally no other "game in town" to which competitors can turn for last-mile connections.

'price squeeze' and foreclosing competition based on use of the tariffed wholesale *input.*"[214]

As for non-price factors, ACS's control over GCI's costs will also return the Anchorage markets to the days of monopoly control. If GCI begins to gain market share by providing new services or better terms, ACS can simply raise the price of its unbundled loops so that GCI must raise its price to where its service is no longer competitive with ACS's. In a similar fashion, ACS can prevent GCI from offering the bundled services packages that Anchorage consumers demand – as soon as GCI experiences some success in the bundled services market, ACS can simply force it to raise its rates and relinquish any strategic advantage it has gained. Simply put, forbearance, as requested by ACS, would puts in its hands the tools to control retail prices in the Anchorage markets.

IV. THE PETITION FAILS EACH PRONG OF THE STATUTORY TEST FOR FORBEARANCE.

Pursuant to Section 10 of the 1996 Act, the Commission may only grant forbearance from enforcement of a particular regulation or provision if it determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[215]

[214] *TRRO* ¶ 59.

[215] 47 U.S.C. § 160(a).

Moreover, in applying the third prong of the test, "the Commission shall consider whether forbearance from enforcing the *provision or regulation will promote competitive* market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[216]

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[216] *Id.* § 160(b). Section 10(d) also specifies that "the Commission may not forbear from applying the requirements of Section 251(c) . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). The Commission recently issued a blanket finding that "Section 251(c) is 'fully implemented' for all incumbent LECs nationwide." *Omaha Forbearance Order* ¶ 53. Specifically, the Commission concluded that Section 251(c) becomes "fully implemented" on the day the Commission's rules implementing the Section become effective. *Id.* GCI believes this is a cramped and unnatural reading of the provision particularly as applied to ILECs such as ACS that did not undergo a Section 271 review: The test for full implementation should be a substantive inquiry into whether the incumbent is actually in full compliance with the Section 251 requirements (much like the Commission's Section 271 approval process), not a formalistic inquiry into whether rules were issued.

At a textual level, the Commission's interpretation makes little sense. Congress directed the Commission to "establish regulations to implement" Section 251 within six months of the passage of the Act. 47 U.S.C. § 251(d)(1). If Congress had believed these rules could be "*fully* implemented" at the moment they were simply "implemented," then Section 10(d) would serve little purpose. After all, the Act also gives the Commission up to 15 months to decide forbearance petitions, *id.* § 160(c), meaning that Section 251(c) (under the Commission's cramped interpretation) would by definition be "fully implemented" long before any forbearance petition addressing Section 251(c) could ever come due. In other words, the Commission's interpretation reads the term "fully" out of the statute, and also renders Section 10(d) toothless.

At a policy level, the Commission's interpretation is equally unreasonable. As noted above, Congress's purpose in creating the 1996 Act was to give competitors meaningful access to incumbents' networks. The purpose of the "fully implemented" language in Section 10(d) is plainly to ensure that competitors have received what Congress intended before the Commission entertains the inevitable raft of forbearance petitions from incumbents. This is a distinctly different inquiry (one focused specifically on markets in transition) than the generic three-prong analysis. The D.C. Circuit, in *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001), expressly affirmed this commonsense view in 2001 when it held that the Section 251(c) provisions were not then "fully implemented" and thus that forbearance was not appropriate. Indeed, the Commission conceded the point at that time. *Id.*

Now, four years later, the Commission reverses itself with barely any explanation, sweeping together markets that underwent a Section 271 review with those that did not. In doing so, it frustrates the plain purpose of Section 10(d) and instead allows incumbents

The D.C. Circuit and the Commission have made clear that forbearance is *permissible "only if all three prongs of the test are satisfied."*[217] Moreover, the burden of proof rests squarely on the petitioning party, which must demonstrate "with specificity why [it] should receive relief under the applicable substantive standards."[218] That burden should be especially high here because the Commission has already found nationwide that CLECs are impaired without access to unbundled loops and other UNEs (such as inside wiring and 911 access) from which ACS now seeks forbearance.[219]

In light of these substantive standards, the Commission cannot grant ACS's defective forbearance petition. First, ACS has simply failed to present any case for forbearance from UNEs other than DS0 loops, let alone a case with the specificity the FCC has required. And second, even with respect to DS0 loops, the petition suffers from a number of logical and factual errors, most prominently the failure to acknowledge and

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to seek forbearance *before* sustainable competition has been achieved. The harm in the present matter is especially pronounced because ACS, as a non-BOC incumbent, has never been subject to the Commission's independent review of its Section 251 compliance through the Section 271 approval process.

[217] *Petition For Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(H)*, Order, 18 FCC Rcd 24648, 24653 (¶ 12) (2003) ("*E911 Petition*"); *see also Cellular Telecomms. & Internet Ass'n v. FCC,* 330 F.3d 502, 509 (D.C. Cir. 2003) ("*CTIA*") ("The three prongs of § 10(a) are conjunctive. The Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.")

[218] *E911 Petition* ¶ 24 (holding that "[t]he standards for granting relief in the forbearance context" are no lower than in the waiver context); *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971) (burden of proof is on waiver petitioner); *see also E911 Petition* ¶ 12 ("[I]f the evidence in the record before the Commission does not establish that all three conditions for forbearance are satisfied, a petition for forbearance must be denied.").

[219] *See TRO* ¶ 94; *Cf. Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Joint Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, 20 FCC Rcd 9361, 9373 ("[A] petitioner seeking forbearance from key provisions of the Act . . . bears a heavy burden under Commission precedent.").

address the fact that forbearance from Sections 251(c)(3) and 251(d)(2) would give ACS unregulated control over a bottleneck facility. As the *Omaha Forbearance Order* makes clear, access to unbundled loops at regulated prices remains necessary to protect competition, even in local markets with advanced facilities-based competition. Indeed, after careful consideration of the issue in both the *TRRO* and the *Omaha Forbearance Order*, it remains true that the Commission has *never* released an incumbent LEC from the obligation to provide competitors with access to loops at regulated prices. And the *Omaha Forbearance Order* also makes clear that, in markets where facilities-based competition is not yet fully mature (as in Anchorage), the regulated loop price should remain the TELRIC-based price.

A. ACS Presents No Arguments to Support Forbearance with Respect to Subloops, Inside Wire, NIDs, Access to 911, OSS, DS1 Loops, and High-Capacity Loops and Dark Fiber.

Although ACS frames its Petition as one for forbearance from unbundling requirements for all UNEs,[220] it fails to make any case for relief from unbundling requirements for UNEs other than DS0 residential market loops. Indeed, ACS acknowledges that mass market loops represent "the most significant area of relief ACS is seeking."[221] As a result of ACS's near-exclusive focus on such loops, ACS has failed to carry its burden of proof with respect to subloops, inside wire, NIDs, access to 911, OSS, DS1 loops, and high-capacity loops and dark fiber. The Commission must therefore deny ACS's petition with respect to these UNEs.

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[220] ACS Petition at 1.

[221] *Id.* at 25; *see also id.* at 12 (characterizing UNE loop relief as "[t]he core of this petition" and stating that relief sought is "fundamentally loop unbundling").

1. Multiunit Premises Subloops

In its *Triennial Review Order*, the Commission specifically and separately considered the issue of impairment with respect to subloops used to access multiunit premises. As the Commission found in the *TRO* Order:

> Because of their prior exclusive access incumbent LECs have first-mover advantages with respect to access to customers in multiunit premises. Requesting carriers face many barriers in accessing customers in multiunit premises, including a general prohibition against facilities-based access; prohibitive sunk costs associated with rewiring a building to serve potentially only a single customer; the refusal for reasonable access to the existing premises wiring; or the refusal to allow installation of a carrier's own new wiring."[222]

Moreover, the Commission recognized, subloops to gain access to multiunit premises "are extremely time-consuming and expensive to duplicate on a pervasive scale and self-provisioning can be prohibitively costly."[223] Likewise, "the loop itself can be overwhelmingly difficult for competitors to self-deploy due to the sunk and fixed costs associated with entry."[224] The Commission therefore concluded, "[f]or all requesting carriers, *especially carriers constructing facilities-based networks,* the ability to access subloops at, or near, the customer's premises in order to reach the infrastructure in those premises where they otherwise would not be able to take their loop the full way to the customer, is critical."[225]

ACS comes forward with no evidence to contradict the Commission's and show that GCI and other CLECs are not impaired with respect to subloops used to access multiunit premises. Absent such a showing, forbearance from access requirements with

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[222] *See TRO* ¶ 348.

[223] *Id.*

[224] *Id.*

[225] *Id.* (emphasis added).

respect to such subloops should not be granted, as access remains necessary to serve the *purposes identified by the Commission* in the *TRO Order*. Denying forbearance is also necessary to ensure that customers in multiunit premises continue to benefit from competition, and are not subjected to higher rates and more onerous terms and conditions for service in violation of Section 10(a)(1) and (2) of the Act.

2. Inside Wire and NID

The same is true with respect to the inside wire and NID UNEs. As the Commission found in the *Triennial Review Order*:

> The economic impairment competitive CLECs face, generally, with respect to most loops is exacerbated through the outright barriers they face in gaining access to customers from owners of multiunit premises. This impairment is especially problematic in situation where competitors are able to construct and provision a local loop using their own facilities all the way to a customer premises, yet still remain unable to reach the end user in that premises. If competitors can only get as far as the building or property line MPOE with their own facilities because they are prohibited from installing their own customer premises wiring to reach a customer a that premises, the incumbent LEC's inside wire subloop or NID may be the exclusive means of reaching an end user. Often there is no alternative inside wiring other than the incumbent LEC's available at the premises.[226]

ACS offers no explanation why the Commission's conclusion does not continue to be true in Anchorage. Nor does ACS counter the careful consideration that gave rise to the inside wire UNE.[227] Accordingly, pursuant to, *inter alia*, Section 10(a)(3), the Commission should summarily deny as anticompetitive and contrary to the public interest

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[226] *TRO* ¶ 351.

[227] *See generally Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000). Even if GCI can ultimately gain access to the basement, that still does not permit GCI to get to the customer's unit, particularly in business buildings that are not already wired for cable television.

ACS's request for forbearance with respect to Section 251(c)(3) as it pertains to these elements, as well as Section *51.319(b) and (c) of the Commission's rules.*[228]

3. Access to 911/E911

ACS likewise fails to offer any evidence of the availability of alternatives to its unbundled 911 and E911 databases. Consequently, the Commission should deny ACS's request for forbearance from unbundling and related pricing obligations with respect to Section 51.319(d)(4)(i)(B) of the Commission's rules.

4. Operations Support Systems

ACS makes no case as to why it is entitled to forbearance from the obligation to unbundle its operations support systems. To the extent any unbundling obligations remain at all – which they must because ACS fails to provide any basis for forbearance as to virtually all elements other than mass market DS0 loops – access to operations support systems is critical. Such access is necessary to ensure that UNEs are provisioned in a not unreasonably discriminatory manner. Thus, ACS's request for forbearance from the requirement to unbundled operations support systems must fail under Section 10(a)(1).[229]

5. DS1 Loops

In its review of competitive carrier facilities within its Anchorage service area, ACS does not even discuss DS1 UNE loops,[230] essentially disregarding the Commission's careful treatment of these facilities in the *TRRO*.[231] In that *Order*, the Commission found that CLECs deploying competitive fiber "face large fixed and sunk

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[228] ACS's request also fails under Section 10(a)(1) and (2).

[229] ACS's request also fails under Section 10(a)(2) and (3).

[230] ACS Petition at 15.

[231] *TRRO* ¶ 149.

costs in deploying competitive fiber, as well as substantial operational barriers in *constructing their own facilities.*"[232] *As a result of these obstacles, the Commission* recognized that "LECs do not typically construct fiber loop facilities at lower capacity levels, such as DS1 or DS3."[233] The Commission recognized, as well, that construction of local loop facilities cannot happen overnight, generally requiring "six to nine months absent unforeseen delay."[234]

Despite the Commission's conclusions, ACS offers no factual support for its requested forbearance. None of ACS's declarants, for example, addresses the market for high capacity business services, including private line, delivered over high capacity DS1 loops. This omission is particularly glaring because the Commission recognized in the *TRRO* that competitive carriers generally have "used competitive facilities to serve customers at the DS1 capacity . . . only over higher-capacity facilities already used to serve one or more other customers within the same building,"[235] highlighting the importance of unbundled DS1 loops to serve customers where such facilities are not already in place. In the face of this record, ACS's failure to provide any explanation of

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[232] *Id.* ¶ 150. The Commission elaborated: "The costs of loop construction are fixed, meaning that they are largely independent of the particular capacity of service that a customer obtains at a particular location. For fiber-based loops, the cost of construction does not vary significantly by loop capacity (*i.e.*, the per-mile cost of building a DS1 fiber loop does not differ significantly from the cost to construct a DS3 or higher-capacity fiber loop), but such costs do vary based on the length of the loop. The most significant portion of the costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into underground conduit to a particular location, rather than from lighting the fiber-optic cable." *Id.*

[233] *Id.* ¶ 150

[234] *Id.* ¶ 151. In Anchorage, due to the limited construction season, the six to nine months of construction time necessary to extend last-mile facilities could require as many as 18 calendar months.

[235] *Id.* ¶ 167.

why it is entitled to forbearance with respect to DS1s loops condemns ACS's request with respect to those loops.[236]

6. High-Capacity Loops and Dark Fiber

ACS asserts that relief from unbundling requirements is appropriate for high-capacity loops and dark fiber because "[n]o CLEC has ever purchased DS-3 or dark fiber loops from ACS."[237] This absence of demand to date, however, does not justify forbearance. Instead, it counsels against forbearance, which would simply limit any possible emergence of competition using high-capacity loops and dark fiber. The Commission should not accept ACS's invitation to use an absence of competition now to ensure an absence of competition in the future.

B. Section 251(c)(3) and 252(d)(1) Requirements Remain Necessary to Ensure that Rates for Both UNEs and Retail Services are Just, Reasonable, and Not Unjustly or Unreasonably Discriminatory.

ACS seeks to persuade the Commission, based on only the most superficial evidence and analysis, that even though GCI has built its effective competitive presence in Anchorage retail markets based upon UNEs, the Commission can nonetheless remove ACS's obligation to provide access to UNEs – particularly DS0 loops – at TELRIC rates without harming competition or consumers in Anchorage markets. In fact, the opposite is true: forbearance as ACS requests will allow ACS to charge unjust and unreasonable UNE rates and subject retail consumers in all markets to unjust and unreasonable monopoly rates.

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[236] ACS's request also violates Section 10(a)(1) and (2).

[237] ACS Petition at 15.

First, ACS improperly rests its forbearance request on an overbroad market definition. As Dr. Sappington describes, and as the Commission itself has recognized on numerous occasions, including in the recent *Omaha Forbearance Order,* the telephony market is composed of numerous product markets.[238] At minimum, the Anchorage product market must be separated into the market for the types of voice telephony services sold to residential and small businesses, and the market for enterprise services, as the Commission did in the *Omaha Forbearance Order*.[239] To accurately reflect the current state of competition in Anchorage, the Commission should go further, and recognize the distinction, arising in part from the predominantly residential location of GCI's cable plant, between the residential and small business markets in Anchorage.[240] Furthermore, as Dr. Sappington describes, the mass market for voice telephony may appropriately be split between MDUs and non-MDUs, which present different competitive environments.[241] In addition, it is appropriate to recognize the pronounced heterogeneity among enterprise customers. For example, enterprise customers are not a single product market, but occupy several product markets, one of which is medium businesses, which typically purchase fractional or full DS1 based services for both voice

[238] Sappington Decl. ¶¶ 25-31.

[239] *Omaha Forbearance Order* ¶22; Sappington Decl. ¶ 31.

[240] *See supra* Section III.A.

[241] Sappington Decl. ¶ 29.

and data private line services.[242] Finally, there is the large enterprise market that buys much higher capacity services.[243]

Nor is the Anchorage markets a unified geographic market. As this Commission made clear in the *SBC-AT&T Order* and *Verizon-MCI Order*, as well as the *Omaha Forbearance Order*, the relevant geographic market for all local services, whether mass market, enterprise or special access, is the customer location, which then can be aggregated into areas facing similar competitive choices.[244] As Dr. Sappington describes, it is clear that all areas of the ACS Anchorage study area do not face the same competitive choices with respect to alternatives to ACS's loops.[245] GCI, for example, is the licensed cable operator in only a portion of the ACS Anchorage study area, not the entire study area.[246] Even with GCI's franchise area, its cable plant is not ubiquitous. Moreover, because GCI – in sharp contrast to the situation considered in the *Omaha Forbearance Order* – is still in the process of deploying its cable telephony service, much of the ACS Anchorage study area that falls within GCI's cable service franchise has not yet been upgraded for cable telephony.[247] Furthermore, to the extent ACS also relies on the presence of GCI's fiber network, that network itself has a limited footprint and does

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[242] Sappington Decl. ¶ 30. As the Commission noted in the *SBC-AT&T Order* and *Verizon-MCI Order*, this market is further composed of separate relevant product markets comprised of different capacity circuits. *See SBC-AT&T Order* ¶ 27 n. 90; *Verizon-MCI Order* ¶ 27 n.89.

[243] Sappington Decl. ¶ 28.

[244] *See SBC-AT&T Order* ¶¶ 28 (special access), 62 (retail enterprise market), 97 (mass market services); *Verizon-MCI Order* ¶¶ 28 (special access); 62 (retail enterprise market); 98 (mass market services); *Omaha Forbearance Order* ¶ 69 n.186; Sappington Decl. ¶¶ 32-39.

[245] Sappington Decl. ¶¶ 32-39, 108-112.

[246] *Id.* ¶ 36; Borland Decl. ¶ 28.

[247] Sappington Decl. ¶ 36; Haynes Decl. ¶¶ 3-21; Exhibit F.

not provide a competitive alternative throughout the ACS Anchorage study area.[248] For these reasons, ACS's counterfactual effort to treat the Anchorage study area as a single geographic market is misleading, inaccurate, and highly inappropriate.

Finally, and most significantly, ACS wholly ignores the vertical effects of the forbearance that it requests. As addressed by Dr. Sappington, and as discussed above, because GCI's retail competition with ACS still substantially relies on the use of ACS UNE loops, if forbearance were granted, ACS would be free to exercise market power by raising rivals' costs.[249] Through such a strategy, if forbearance were to be granted, ACS could increase not only UNE rates, but also the retail prices for all telephony services within its Anchorage study area to levels that are unjust and unreasonable. ACS presents no evidence to demonstrate that it lacks the ability to engage in such anticompetitive conduct in any of the relevant product and geographic markets within its Anchorage service area. Thus, ACS's request for forbearance must be rejected under Section 10(a)(1).

1. ACS Should Not Be Relieved of its Only Regulatory Obligation to Offer UNEs to Requesting Carriers.

i. The *Omaha Forbearance Order* Precludes Any Finding that Forbearance from Access to UNEs is Warranted in this Case.

ACS's request for forbearance from its obligation to provide access to unbundled loops – *i.e.*, the obligation to make such loops available – must be rejected in light of the Commission's decision in the *Omaha Forbearance Order*. While the Commission made clear that it was not, in the *Omaha Forbearance Order*, adopting any rules of general

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[248] *See* Exhibit BB-1, attached to Brown Decl.

[249] Sappington Decl. ¶¶ 11-23, 45-55, 87-96, 101-105, 113-122.

applicability, the Commission's reasoning does not permit the Commission to forbear from Section 251(c)(3)'s basic requirement that ACS make unbundled loops available to requesting carriers.

Although the Commission, in the *Omaha Forbearance Order*, granted Qwest's request from forbearance from Section 251(c)(3), including the obligation to unbundle loops, the Commission did so only while declining to forbear from similar requirements under Section 271(c)(2)(B)(iv) through (vi).[250] As a consequence, Qwest remains under a regulatory obligation to unbundle loops in all parts of the Omaha MSA, including the nine wire centers in which it was granted forbearance from Section 251(c)(3).

Moreover, the grounds on which the Commission rejected Qwest's request for forbearance from Section 271 (c)(2)(B)(iv) through (vi) dictate that the Commission likewise reject ACS's request for relief from the Section 251(c)(3) obligation to make available unbundled loops, switching or transport. In that decision, the Commission recognized that economic barriers to self-provisioning and the length of time necessary to construct local loops required some continuing obligation to make UNEs available to ensure that carriers could continue to provide service while constructing their own last-mile facilities.[251] Here, GCI has only recently begun to deploy its own last-mile facilities, and continued access to UNEs is necessary to allow GCI to continue this effort.[252]

Furthermore, the Commission denied forbearance from the requirement that Qwest make available unbundled loops because it said that the availability of loops and

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[250] *Omaha Forbearance Order* ¶ 100.

[251] *Id.* ¶ 104.

[252] Borland Decl. ¶¶ 27-49.